Maso Daloh & Anor v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–70 OF 2008
ZALEHA ZAHARI, KN SEGARA AND RAMLY ALI JJCA
29 OCTOBER 2009

Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Dangerous drugs found in car in which accused persons were travelling — Two other persons travelled in car — Whether trial judge misdirected himself in law and in fact — Whether prosecution proved beyond reasonable doubt first accused seen driving car — Whether defence that there were two other persons involved mere fabrication — Dangerous Drugs Act 1952 s 39B(2)

Upon receiving information that trafficking in drugs from Thailand was about to take place at the Taman Tasik Titiwangsa car park, in Kuala Lumpur ('the car park'), Chief Inspector Mohd Ashril bin Md Johar ('Inspector Ashril') organised a team of six personnel to participate in the ambush. The police ambush party was split into two groups one led by Inspector Ashril and the other led by Inspector Azlan. Both parties were instructed to lay in wait for a Honda Civic car bearing Thai registration No AB 556 ('the car). When the two ambush parties arrived at the car park they saw the car matching the given description parked about 30 to 50 metres away with two persons in it. One of the two was observed getting out of the car while the other was seen going to the back passengers' seat. Thereupon the two ambush parties proceeded toward the said car in their respective police vehicles and apprehended the two people there. The person who was standing outside the car, the first accused, attempted to run but Inspector Azlan gave chase and apprehended him. The other person arrested was the person at the rear passenger seat, the second accused. Both the accused were Thai nationals. A search of the car led to the discovery of 17 plastic packages that contained what was later confirmed to be 34,942g of cannabis. The two accused were charged with the offence of trafficking in 34,942g of cannabis under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). The defence of the accused was that they had travelled from Narathiwat, in Thailand, to Kula Lumpur at the invitation of one Pak ('Pak'); that they were travelling in the car as passengers seated at the rear of the car while Pak drove the car, with his friend Razak seated in the front passenger seat; and that they were totally oblivious of the presence of the packages of cannabis in the car throughout the journey. The trial judge formed the view that the defence of the two accused was a bare denial and found the existence of Pak and Razak to be a fabrication. The two accused were found guilty and sentenced to death. This was their appeal

against that conviction and sentence. The two main issues for determination in this case were whether the prosecution had proved beyond a reasonable doubt that the first accused was seen driving the car and whether the two accused were the only two persons in the car at all material times.

Held, allowing the appeal:

(1) After perusing the evidence adduced at the trial it was found that the trial judge had failed to re-evaluate judiciously the evidence before him at the end of the trial. The information received that drug trafficking will take place at the scene was not received by Inspector Ashril but by his commanding officer who was neither called as a witness by the prosecution nor offered as a witness to the defence. As such the information was inadmissible evidence that ought to have been excluded from consideration. In addition the area from which the ambush parties kept watch of the car was not lit by any street lights and further darkened by trees and shrubs. This would affect general visibility of the area especially since the watch was from a distance of 30–50 metres away (see paras 18–20).

(2) The trial judge had failed to consider that the first accused was not in possession of any valid driving licence to corroborate the prosecution's case that he was driving the car all the way from Narathiwat. Neither was there any evidence that the car had been under surveillance from the time it left Thailand or from any other reasonable part of the journey from Thailand to Kuala Lumpur. In fact, during cross-examination Inspector Ashril had agreed that he did not know who drove the car to the scene of the incident and that he did not know the number of passengers in the car at the time it arrived at the place of the incident. In such circumstances, the sworn testimony of the two accused that the car was not driven by the first accused ought to have been given considerable credence (see paras 20 & 24).

(3) In the light of the evidence adduced, such as, the discovery of two jackets in the driver's seat of the car that did not belong to the two accused; the fact that the car keys were found in tact at the ignition switch; the fact that neither of the accused was the registered owner of the car; and the fact that Inspector Ashril did not know how long the car was in the vicinity of the car park before the police arrived at the scene, the evidence of the two accused that there were two other persons could not be dismissed as mere fabrication. Upon an examination of the recorded evidence and its proper evaluation, to label Pak and Razak as fictitious characters or a mere fabrication to exculpate the two accused from the charge was not an objective and unprejudiced finding. It is trite law that in a criminal trial when a given set of facts gives rise to more than one inference, then the most favourable inference should be

A accorded to the accused. As such the trial judge had misdirected himself in not giving the benefit of the doubt to the accused (see paras 25–26 & 28).

[Bahasa Malaysia summary

B Setelah mendapat maklumat bahawa suatu aktiviti pengedaran dadah dari Thailand akan berlaku di tempat parkir kereta Taman Tasik Titiwangsa, di Kuala Lumpur ('tempat parkir kereta'), Ketua Inspektor Mohd Ashril bin Md Johar ('Inspektor Ashril') menubuhkan satu kumpulan yang terdiri daripada enam anggota untuk serbuan. Kumpulan serbuan polis tersebut dibahagikan C kepada dua – satu diketuai oleh Inspektor Ashril dan satu lagi diketuai oleh Inspektor Azlan. Kedua-dua kumpulan tersebut diarahkan untuk menunggu sebuah kereta Honda Civic bernombor daftar Thai AB 556 ('kereta tersebut'). Apabila kedua-dua kumpulan serbuan tersebut tiba di tempat parkir kereta itu, mereka nampak kereta sama seperti yang digambarkan, D diparkir kira-kira 30–50 meter jauhnya bersama dua orang di dalamnya. Salah seorang daripada mereka didapati keluar dari kereta tersebut dan seorang lagi berpindah ke tempat duduk penumpang di belakang. Kedua-dua kumpulan serbuan tersebut kemudiannya mendekati kereta tersebut dengan kereta polis mereka dan menahan kedua-dua orang di dalam kereta tersebut. E Orang yang berdiri di luar kereta, tertuduh pertama, cuba melarikan diri tetapi Inspektor Azlan berjaya mengejar dan menangkapnya. Seorang lagi yang ditangkap merupakan orang yang duduk di tempat duduk penumpang di belakang, tertuduh kedua. Kedua-dua tertuduh adalah warga Thai. Daripada pemeriksaan ke atas kereta tersebut, telah dijumpai 17 beg plastik F mengandungi, yang kemudiannya disahkan 34,942g kanabis. Kedua-dua tertuduh dituduh dengan kesalahan mengedar 34,942g kanabis d bawah s 39B(2) Akta Dadah Berbahaya 1952 ('Akta'). Pembelaan tertuduh adalah mereka dalam perjalanan dari Narathiwat, Thailand ke Kuala Lumpur atas jemputan Pak; bahawa mereka duduk di tempat duduk penumpang di G bahagian belakang dan Pak memandu bersama rakannya, Razak yang duduk di tempat duduk penumpang di bahagian depan; dan bahawa mereka tidak tahu menahu tentang bungkusan kanabis dalam kereta tersebut, sepanjang perjalanan mereka. Hakim bicara berpendapat bahawa pembelaan kedua-dua tertuduh merupakan penafian semata-mata dan bahawa kewujudan Pak dan H Razak adalah cerita rekaan. Kedua-dua tertuduh didapati bersalah dan dihukum mati. Ini merupakan rayuan mereka terhadap sabitan dan hukuman. Dua isu utama untuk dipertimbangkan ialah sama ada pihak pendakwaan telah membuktikan melampaui keraguan munasabah bahawa tertuduh pertama telah dilihat memandu kereta tersebut dan sama ada hanya I kedua-dua tertuduh merupakan orang yang berada dalam kereta tersebut pada setiap masa material.

Diputuskan, membenarkan rayuan:

(1) Setelah meneliti keterangan yang dikemukakan semasa perbicaraan

adalah didapati bahawa hakim bicara gagal menilai semula dengan bijaksana keterangan di hadapannya pada akhir perbicaraan. Maklumat yang diterima bahawa pengedaran dadah akan berlaku di tempat kejadian tidak diterima oleh Inspektor Ashril tetapi oleh pegawai pemerintahnya yang tidak dipanggil sebagai saksi oleh pihak pendakwaan atau ditawarkan sebagai saksi kepada pihak pembelaan. Oleh itu, keterangan tersebut tidak boleh diterima dan tidak harus dipertimbangkan. Tambahan pula, tiada lampu jalan di kawasan yang diperhatikan dan menjadi semakin gelap dengan adanya pokok-pokok dan semak. Ini akan mengganggu penglihatan ke atas kawasan tersebut terutamanya pemerhatian itu dilakukan dalam jarak 30–50 meter (lihat perenggan 18–20).

(2) Hakim bicara gagal mempertimbangkan bahawa tertuduh pertama tidak memiliki apa-apa lesen memandu yang sah untuk menyokong kes pihak pendakwaan bahawa dia telah memandu kereta tersebut sepanjang jalan dari Narathiwat. Juga tiada keterangan yang menunjukkan bahawa kereta tersebut telah diawasi semasa kereta itu meninggalkan Thailand atau dari mana-mana sepanjang perjalanan dari Thailand ke Kuala Lumpur. Malah, semasa pemeriksaan balas Inspektor Ashril bersetuju bahawa dia tidak tahu siapa yang memandu kereta tersebut ke tempat kejadian dan bahawa dia tidak tahu bilangan penumpang kereta tersebut semasa kereta tersebut sampai ke tempat kejadian. Dalam keadaan sebegitu, keterangan bersumpah kedua-dua tertuduh bahawa kereta tersebut tidak dipandu oleh tertuduh pertama harus diterima (lihat perenggan 20 & 24).

(3) Melihat kepada keterangan yang dikemukakan, seperti penemuan dua jaket di tempat duduk pemandu kereta tersebut yang bukan milik kedua-dua tertuduh; fakta bahawa kunci kereta masih lagi di suis pencucuhan; fakta bahawa kedua-dua tertuduh bukanlah pemilik berdaftar kereta tersebut; dan fakta bahawa Inspektor Ashril tidak tahu berapa lama kereta tersebut sudah berada di kawasan parkir kereta tersebut sebelum polis tiba di tempat kejadian, keterangan kedua-dua tertuduh bahawa ada dua orang lain, tidak boleh ditolak atas sebab ianya cerita rekaan. Setelah penelitian keterangan yang direkodkan dan setelah penilaian, melabelkan Pak dan Razak sebagai karektor rekaan atau yang diada-adakan untuk membebaskan kedua-dua tertuduh daripada tuduhan bukanlah keputusan yang objektif dan tidak memprejudis. Adalah undang-undang tetap dalam perbicaraan jenayah, apabila satu set fakta membangkitkan lebih daripada satu inferens, maka inferens yang lebih menyokong akan terpakai kepada tertuduh. Maka hakim bicara telah salah arah apabila tidak memberikan faedah keraguan yang munasabah kepada tertuduh (lihat perenggan 25–26 & 28).]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

Legislation referred to

Dangerous Drugs Act 1952 ss 6, 39A(2), 39B(1), (2)

Appeal from: Criminal Trial No 45–53 of 2002 (High Court, Kuala Lumpur)

Gooi Soon Seng (Naran Singh & Co) for the appellants.
Mohamad Abazafree bin Mohamad Abbas (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

KN Segara JCA:

[1] Maso Daloh (the first accused) and Romuelee Yakoh (the second accused) were found guilty and convicted in the High Court Kuala Lumpur for the offence of trafficking in 34,942g of cannabis at the car park in Taman Tasik Titiwangsa on 20 February 2002 at 12.10am. They were sentenced to death under s 39B(2) of the Dangerous Drugs Act 1952 ('DDA').

[2] The first and second accused are Thai nationals. The circumstances under which they were arrested are as follows.

[3] On 19 February 2002 at about 10pm Chief Inspector Mohd Ashril bin Md Johar ('SP3') received information that trafficking in drugs was about to take place at Taman Tasik Titiwangsa, Kuala Lumpur. The information included the fact that the drugs were being brought from Thailand in a Honda Civic car bearing Thai registration No AB 556. He was given the information by his commanding officer and was instructed to lay an ambush ('Pemberi maklumat adalah pegawai pemerintah saya. Dia yang memberi maklumat dan mengarahkan saya membuat serbuan').

[4] Before taking off from Bukit Aman to accomplish his mission, SP3 briefed his team of six other police personnel, who were to participate in the ambush, that trafficking in ganja from Thailand will take place at the Taman Tasik Titiwangsa car park ('Taklimat ialah berkenaan akan berlakunya satu pengedaran dadah jenis ganja dari Negara Thailand, yang akan dilakukan di kawasan tempat letak kereta, Taman Tasik Titiwangsa, Kuala Lumpur'.).

[5] The police ambush party was split into two groups — one was led by SP3 and the other by Chief Inspector Wan Azlan ('SP6'). They went to the vicinity of the target area in two police vehicles. Upon arrival at the scene at

about 12.10am on 20 February 2002, both of the police vehicles were parked side by side on the road (at Y and Z on the sketch plan P9) leading to the parking area of the targeted vehicle (at X on P9).

[6] All the police personnel remained in their respective vehicles. SP3 made observation for about ten minutes from inside his vehicle. He saw a red Honda Civic motorcar bearing Thai registration No AB 556 Narathiwat in the targeted location at the car park in Taman Tasik Titiwangsa. The distance between the parked police vehicles and the Honda Civic was about 30 – 50 meters ('S: Berapakah jarak dari kedudukan awak di dalam kereta, iaitu tempat bertanda Y dan Z di dalam ID9, dengan kereta AB 556 yang berhenti di X? J: Lebih kurang 30 – 50 meter.').

[7] During the ten minutes observation SP3 saw two persons in the said car, one of whom was the driver and the other, a passenger seated next to the driver. The driver got out of the car and stood on the left side of the said car whereas the other person got out of the car and went to the back passengers' seat. He observed that this person was in the process of doing something at the back seat of the car. Thereupon, SP3 and SP6 proceeded towards the said car in their respective police vehicles. SP3 positioned his vehicle right in front of the car whereas SP6 positioned his vehicle on the right side of the said car.

[8] The person who was standing beside the car attempted to run away from the scene, but SP6 gave chase and arrested him. He was the first accused. SP3, on the other hand, arrested the person who was at the rear passenger seat. He was the second accused.

[9] Thereafter, SP3 made a search of the car and found four plastic packages on the rear seat and 13 plastic packages at the rear passenger seat foot-well, immediately behind the driver's seat. He further recovered 17 more plastic packages from within the compartment immediately behind the back-rest of the rear seat and the boot of the car. The said 17 plastic packages were retrieved by SP3 through the speaker holes after the cover of the speakers were loosened using a screwdriver found in the car. All the 34 plastic packages were suspected to contain cannabis. The chemist ('SP4') confirmed that the packages contained cannabis weighing a total of 34,942g.

[10] The defence of the accused can be summarised as follows.

[11] Both the first and second accused live in Narathiwat, Thailand. They are friends. On 19 February 2002, at about 10am, the second accused was in his house in Narathiwat when his friend, Pak, came to his house in motorcar No AB 556 ('P24') and invited him to go to Kuala Lumpur ('KL'). Pak had a business matter to attend to in KL ('Pak datang untuk ajak saya pergi ke

Kuala Lumpur kerana dia ada urusan perniagaan di Kuala Lumpur. Selepas itu dia ajak bersiar-siar di Kuala Lumpur.'). Pak told him that another friend would also be coming together on the trip. When the second accused inquired from Pak whether he (the second accused) could invite a friend to join them on this trip, Pak replied that he had no problem with that. Pak told the second accused to be ready to leave Narathiwat for KL at 11am.

[12] Pak then went away from the second accused's house. The second accused contacted first accused by telephone and invited him to join him on this trip to KL. The first accused accepted the second accused's invitation. He arrived at the second accused's house at about 10.30am.

[13] The first and the second accused waited for the arrival of Pak. At about 11am. Pak arrived, driving the same car ('P24'), with his friend, Razak, seated in the front passenger seat. The first and second accused got into the rear passenger seat. They set off for KL with Pak driving the car. Enroute, Pak stopped at the Sg Buloh Toll Plaza for about an hour to have some food and rest. Then, from Sg Buloh they proceeded on their journey, with Pak still driving the car, Razak seated in the front passenger seat, whilst the first and second accused sat at the rear passenger seat.

[14] Pak brought the car to a stop when they reached a place where there was a large lake. The first and second accused got out of the car. Pak and Razak told them to wait there while they went in search of a friend and the use of a public telephone. Pak and Razak went on foot leaving the car parked there.

[15] It was dark. The first accused smoked a cigarette whilst the second accused stood near some tree. Suddenly, they were attacked upon by several male persons wearing ordinary clothes. The attackers identified themselves as 'Police' and alleged that the first and second accused had brought drugs. They searched the car ('P24') and retrieved several packages. The first and second accused were arrested and handcuffed.

[16] In short, the defence of the accused was that they had travelled all the way from Narathiwat in P24, as passengers seated at the back of the car. It was on the invitation of Pak (as regards the second accused) and on the invitation of the second accused (as regards the first accused). They had never been to KL before. They wanted to have fun in KL. They were totally oblivious of the presence of the packages in the car, throughout the journey.

[17] The learned trial judge formed the view that the defence of the accused was a bare denial. He made a finding that the existence of Pak and Razak was a fabrication.

[18] We are unanimous that the trial judge has misdirected himself, both in law and in fact, when he found that the defence was a bare denial. The trial judge failed to re-evaluate judiciously the evidence before him at the end of the trial to determine whether the prosecution has proved a case of trafficking, beyond a reasonable doubt, against the two accused.

On the issue of whether the first accused was seen driving the car P24 by SP3 and SP6 and whether there were only two persons in the car at all material times from Narathiwat in Thailand till the accused were arrested at the car park in Taman Tasik Titiwangsa, just shortly after midnight of 19 February 2002

[19] We have perused through the evidence adduced at the trial very carefully. We have excluded from consideration inadmissible evidence recorded by the trial judge, in particular, the information that drug trafficking will take place at the scene. We suspect the trial judge was prejudiced and biased by this information received by SP3 from his commanding officer, who was neither called as a witness by the prosecution nor offered as a witness to the defence.

[20] The sketch plan P9 does not show any street light at the car park. There are tall trees and shrubs in the vicinity. This can be seen in the photographs. The trees and shrubs could further darken the area and seriously affect general visibility of the area for anyone keeping observation of the targeted motorcar from a distance of 30–50 meters away.

[21] We are of the view that the trial judge has failed to consider that the first accused was not in possession of any valid driving licence to corroborate the prosecution's case that the first accused was driving the car all the way from Narathiwat. There was no evidence that this car had been under surveillance from the time it left Thailand, the Sg Buloh Toll Plaza or from any other reasonable point of the journey from Thailand to KL, that day. He did not evaluate carefully the evidence of the first accused in cross-examination with the evidence of the prosecution (SP3's evidence in cross-examination) before *rejecting* the first accused's testimony that he was not the driver of the car. SP3 *had agreed*, in cross-examination, that *he did not know* who drove the car to the scene of the incident and that he did not know how many passengers were in the car at the time it arrived at the place of the incident.

[22] The first accused testified:

Saya tidak setuju saya dan OKT 2 sahaja yang pergi ke tempat di mana kami ditangkap. Ada 2 orang lain.

Saya tidak setuju bahawa saya yang memandu kereta itu dan OKT 2 duduk di sebelah saya. Saya tak tahu kenapa saksi-saksi polis mengatakan saya yang memandu kereta itu ke tempat kejadian. *Saya tiada lesen memandu*.

[23] On the other hand SP3 testified under cross-examination:

S: Rujuk P4A dan B kepada saksi. Adakah kamu setuju bahawa terdapat beberapa petak meletakkan kenderaan ditempat kejadian?

J: Ya, iaitu tempat meletak motosikal.

S: Rujuk P4B kepada saksi. Kereta tersebut apabila sampai ditempat kejadian, diletakkan menghala ke mana?

J: Ke kanan gambar iaitu membelakangkan *pokok-pokok* yang terdapat dalam gambar.

S: Rujuk ID9 kepada saksi. Adakah kereta tersebut diletakkan di tempat bertanda H dalam ID9?

J: Kereta tersebut diletakkan di tempat bertanda K.

S: *Berapakah jarak dari kedudukan awak di dalam kereta, iaitu tempat bertanda Y dan Z di dalam ID9, dengan kereta AB 556 yang berhenti di X?*

J: *Lebih kurang 30 ke 50 meter*.

S: *Adakah kamu setuju bahawa jarak itu adalah agak jauh?*

J: *Setuju.*

S: Adakah kamu setuju bahawa waktu itu jam lebih kurang pukul 12.10 pagi?

J: Setuju.

S: *Adakah kamu setuju bahawa tempat letak kereta tersebut dikelilingi oleh pokok-pokok?*

J: *Setuju.*

S: Saya katakan kepada kamu bahawa tempat di mana kereta P24 diletakkan, adalah agak gelap?

J: Saya tidak setuju.

S: Kenapa tidak setuju?

J: Semasa kereta itu diletakkan, ianya berdekatan dengan tiang lampu dan lampunya bernyala.

S: …

J: …

S: *Rujuk ID9 kepada saksi. Adakah tiang lampu tersebut dinyatakan di dalam rajah kasar ini?*

J: *Tiada.*

…

J: Saya dan anggota saya membuat pengawasan di tempat tersebut lebih kurang 10 minit sebelum membuat serbuan.

S: Rujuk ID9 kepada saksi. Dari arah manakah kereta P24, memasuki kawasan serang hendap?

J: Dari arah bertanda G dalam ID9.

S: *Siapa sampai dulu?*

J: *Kereta P24 sampai terlebih dahulu daripada kami.*

S: *Adakah kamu tahu sudah berapa lama kereta P24 tersebut berada di situ sebelum kamu dan anggota kamu sampai?*

J: *Dari pemerhatian saya, lebih kurang 10 minit.*

S: *Adakah pemerhatian dilakukan di tempat lain, selain dari posisi Y dan Z di dalam ID9?*

J: *Tiada.*

S: Adakah kamu setuju bahawa apabila kamu sampai ke tempat kejadian, kereta P24 sudah ada di situ da kamu tidak tahu sejak bila kereta tu sampai di situ?

J: Setuju.

S: *Saya katakan kepada kamu bahawa kamu tidak tahu siapa yang memandu kereta tersebut ke tempat kejadian, setuju atau tidak?*

J: Setuju.

S: *Saya katakan kepada kamu bahawa kamu tidak tahu berapa orang penumpang di dalam P24, semasa ianya sampai di tempat kejadian, setuju atau tidak?*

J: *Setuju.*

S: Rujuk P19A dan B kepada saksi. *Adakah kamu tahu siapa punya jeket-jeket ini?*

J: *Saya tidak tahu.*

S: *Adakah kamu setuju bahawa dengan terdapatnya dua jeket ini, kemungkinan terdapat dua orang penumpang lain dalam kereta tersebut?*

J: *Setuju.*

[24] In the above circumstances, the sworn testimony of the first and second accused that the car was not driven by the first accused must be given considerable credence, and, at the very least, has created a very serious doubt on the prosecution's case as to the identity of the driver of the car and the number of passengers in the car.

[25] Similarly, the evidence of the first and second accused that there were two other persons, namely, Pak as the driver and Razak as a co-traveller seated in the front passenger seat, cannot be dismissed as an afterthought. This is

especially so when there was evidence that:

(i) two jackets were found on the driver's seat and were not established as belonging to the first or second accused (see exh P10 item 7 and 8 'Dijumpai di dalam kereta *di tempat duduk pemandu*');

(ii) the key of the car was not recovered from the person of the first or second accused but found intact at the ignition switch (see exh P10 item 9 'Dijumpai di tempat pemutar suis kereta');

(iii) the registered owner of the car was neither the first nor the second accused; and

(iv) SP3 did not know for *how long the car had been* in the vicinity of the car park *before the police arrived* and made observation for about ten minutes prior to arresting both the accused.

[26] In the above circumstances, there could very well be some truth in the version of the accused that Pak and Razak had got out of the vehicle and left the scene, leaving both the accused behind, after intimating their necessity to do what they did. The car could have arrived at the vicinity well before the police arrived to make their observation. Pak and Razak could have completely escaped the notice of the police (SP3 and SP6), bearing in mind the incident took place in the late hours of the night. With the vicinity further shrouded in darkness by the shadows of the trees and shrubs, sightings could be elusive and deceptive. There is nothing improbable about Pak and Razak. In our view, to label them as fictitious characters, or a mere fabrication to exculpate the first and second accused from the charge, is not an objective and unprejudiced finding, upon an examination of the recorded evidence and its proper evaluation. We are unanimous that the trial judge has not applied his mind to the evidence produced with greater scrutiny than would ordinarily be required as the charge carried the mandatory death sentence upon conviction.

[27] We are of the view that upon a careful evaluation of the sworn testimony of both the accused and, the evidence adduced by the prosecution, no reasonable tribunal would have made the finding expressed by the trial judge in his grounds as follows:

> Pembelaan berhujah bahawa dua jeket tersebut menguatkan atau menyokong versi pembelaan bahawa dua jeket tersebut kepunyaan Pak dan Razak. Saya menolak hujah ini. *Dua jeket tersebut mungkin juga kepunyaan tertuduh pertama dan kedua. Saya tidak ragu-ragu memutuskan bahawa Pak dan Razak adalah rekaan pembelaan tertuduh pertama dan kedua.* Penafian (bare denial) adalah jelas tidak diterima oleh undang-undang ...

(Emphasis added.)

[28] The learned trial judge has misdirected himself in not giving the benefit of the doubt to the accused regarding the two jackets when there was no evidence adduced by the prosecution as to whom the jackets belonged. It is trite law that in a criminal trial when a given set of facts gives rise to more than one inference, then the most favourable inference should be accorded to the accused.

[29] In the upshot, we are unanimous the conviction on the charge for trafficking under s 39B(1) of the DDA is unsafe. We accordingly allow this appeal and set aside the order of the High Court. We find both the appellants guilty of the offence of possession under s 6 of the DDA punishable under s 39A(2) of the DDA. Both the appellants are convicted and sentenced to 15 years imprisonment (from date of arrest) and ten strokes of the rotan.

Appeal allowed.

Reported by Kohila Nesan